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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF
AMERICA,

Plaintiff/Respondent,

v.

Haki Dervishi,

Defendant/Movant.

Case Nos. EDCV 14-02135-VAP
EDCR 12-00084-VAP

**ORDER DENYING MOTION FOR
RELIEF UNDER 28 U.S.C.
§ 2255**

**[Motion filed on October 16,
2014]**

I. SUMMARY OF PROCEEDINGS

On or about October 16, 2014, pro se Petitioner Haki Dervishi filed this "Motion to Set Aside, or Correct Sentence by a Person in Federal Custody" pursuant to 28 U.S.C. § 2255 ("Motion"). (Doc. No. 66.)¹ The government opposed the Motion on January 16, 2015, (Doc. No. 69), to which Petitioner responded on February 3, 2015 (Doc. No. 70). Petitioner pleaded guilty to

¹ Docket citations refer to entries in Petitioner's underlying criminal matter, United States v. Haki Dervishi, No. 12-cr-84-VAP (C.D. Cal.).

1 violations of 7 U.S.C. § 2024(b) on June 18, 2013, (Doc.
2 No. 30), and now challenges the legality of his sentence.
3 Petitioner bases his motion on a purportedly incorrect
4 calculation of his sentencing range under the United
5 States Sentencing Guidelines. (See generally Doc. No.
6 66.)

7 8 **II. BACKGROUND**

9 **A. Petitioner's Conviction and Sentence**

10 On November 7, 2012, a grand jury in this district
11 returned a seven-count indictment against Petitioner
12 arising out of an illegal scheme to trade cash for
13 federal food stamp benefits. (Doc. No. 1.) On June 18,
14 2013, Petitioner pleaded guilty to count three of the
15 indictment, which charged him with "illegal trafficking
16 in food stamp benefits in violation of Title 7, United
17 States Code, Section 2024(b), and aiding and abetting,
18 causing an act to be done in violation of Title 18,
19 United States Code, Section 2." (Doc. No. 29 at 2.) As
20 part of Petitioner's guilty plea, he waived his right to
21 appeal the conviction and also waived his right to appeal
22 most aspects of his sentence. (Doc. No. 29 ¶¶ 16, 17.)
23 Defendant's waiver of appeal of his sentence was
24 contingent upon the imposition of a total term of
25 imprisonment of no more than 78 months. (Doc. No. 29
26 ¶ 17.)

1 The Court imposed a sentence of 42 months
2 imprisonment, and ordered restitution paid to the United
3 States Department of Agriculture in the amount of
4 \$3,511,878, pursuant to 18 U.S.C. § 3663A. (Doc. No.
5 45.) Because the term of imprisonment actually imposed
6 was 42 months, (id.), Petitioner in fact waived his
7 appellate rights regarding his sentence. On June 4,
8 2014, the United States Court of Appeals for the Ninth
9 Circuit granted Petitioner's motion for voluntary
10 dismissal of his direct appeal. (Doc. No. 62.)
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12 **B. Petitioner's Presentence Investigation Report**

13 Petitioner's motion argues the Presentence
14 Investigation Report ("PSR") prepared by the United
15 States Probation Office incorrectly calculated his
16 sentencing range under the United States Sentencing
17 Guidelines. Petitioner's PSR categorized his Total
18 Offense Level as 24, his Criminal History Score as III,
19 and provided for a recommended Guideline Sentence of 63
20 to 78 months. (Doc. No. 36 ¶¶ 39, 57.) The PSR also
21 states the amount of loss resulting from the scheme
22 totalled \$3,511,878. (Id. ¶ 32.)
23

24 **III. LEGAL STANDARD**

25 Section 2255 authorizes the Court to "vacate, set
26 aside or correct" a sentence of a federal prisoner that
27 "was imposed in violation of the Constitution or laws of
28

1 the United States." 28 U.S.C. § 2255(a). Claims for
2 relief under § 2255 must be based on some constitutional
3 error, jurisdictional defect, or an error resulting in a
4 "complete miscarriage of justice" or in a proceeding
5 "inconsistent with the rudimentary demands of fair
6 procedure." United States v. Timmreck, 441 U.S. 780,
7 783-84 (1979). If the record clearly indicates that a
8 movant does not have a claim or that he has asserted "no
9 more than conclusory allegations, unsupported by facts
10 and refuted by the record," a district court may deny a
11 § 2255 motion without an evidentiary hearing. United
12 States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986); see
13 also United States v. Chacon-Palomares, 208 F.3d 1157,
14 1159 (9th Cir. 2000) ("When a prisoner files a § 2255
15 motion, the district court must grant an evidentiary
16 hearing '[u]nless the motion and the files and records of
17 the case conclusively show that the prisoner is entitled
18 to no relief.'" (quoting 28 U.S.C. § 2255)).

19 20 IV. DISCUSSION

21 A. Grounds for Relief

22 Construing Petitioner's motion liberally, it raises
23 three grounds for relief. First, Petitioner asserts the
24 PSR "was not investigated thoroughly," resulting in
25 erroneous calculations of his criminal history and
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offense level.² (Doc. No. 66 at 7-9.) Second, Petitioner contends the PSR incorrectly calculated his criminal history score because the PSR stated Petitioner was on probation for a previous state conviction at the time of the offense of conviction. (Doc. No. 66 at 9-11.) Third, Petitioner challenges the PSR's amount-of-loss calculation.³ Thus, all Petitioner's challenges derive from the PSR's content.

B. Petitioner's Claims are Procedurally Defaulted

"A § 2255 movant procedurally defaults his claims by not raising them on direct appeal and not showing cause and prejudice or actual innocence in response to the default." United States v. Ratigan, 351 F.3d 957, 962 (2003)(citing Bousley v. United States, 523 U.S. 614, 622 (1998), and Medrano v. United States, 315 F.2d 361, 361-62 (9th Cir. 1963)).

Nonconstitutional sentencing issues "may not be raised under § 2255 if [they were] not raised at sentencing or on direct appeal." United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996); United

² Petitioner's first ground for relief essentially asserts his innocence based on a theory of entrapment by estoppel; he states he received reassurance from the Department of Agriculture in 2011 and 2012 that he could "keep on doing what he was doing." (Doc. No. 66 at 7-9.)

³ The Government restates Petitioner's third ground for relief as a challenge to the amount of restitution ordered by the Court. (Doc. No. 69 at 3.)

1 States v. Schlesinger, 49 F.3d 483, 485 (9th Cir. 1995).
2 It is well-settled that "computational errors in a
3 petitioner's presentence report do not give rise to a
4 constitutional issue." Id.; United States v. Keller, 902
5 F.2d 1391, 1393 (9th Cir. 1990).

6
7 The transcript of Petitioner's sentencing hearing
8 does not indicate any objections to the PSR's findings or
9 calculations relevant to Petitioner's motion.⁴
10 Petitioner waived his appellate rights as part of his
11 plea deal, has not challenged the validity of that waiver
12 here, and he voluntarily withdrew his direct appeal.
13 Therefore, section 2255's procedural bar precludes
14 Petitioner's motion insofar as it seeks relief from any
15 claim not raised at sentencing or on direct appeal.⁵

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19 ⁴ Petitioner's sentencing memorandum raised an
20 objection to the PSR's amount-of-loss calculation, but at
21 the sentencing hearing Petitioner's counsel stated he
22 agreed with the Court's characterization of that
23 objection as an argument under 18 U.S.C. § 3553(a), not
24 the guidelines. (See Sent. Hr'g Tr. 9.) Further,
25 Petitioner stipulated to a loss amount of more than
26 \$2,500,000 but less than \$7,000,000 in the plea
27 agreement. (Doc. No. 29 at 10.)

28 ⁵ As the government points out, the PSR erroneously
added 2 points to Petitioner's criminal history score
under U.S.S.G. § 4A1.1(d). (Doc. No. 69 at 6 n.2.)
Petitioner was not, in fact, on probation at the time of
the offense of conviction. The PSR recommended a
criminal history score of III, which the Court reduced to
II at the sentencing hearing. Thus, as explained in
greater detail below, any error was inconsequential.

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2 **C. Petitioner's Counsel was not Ineffective**

3 Petitioner does not claim his counsel was
4 ineffective, but even if he did such a claim would fail.
5 To establish ineffective assistance of counsel, a
6 defendant must prove: (1) "counsel's representation fell
7 below an objective standard of reasonableness," and (2)
8 "there is a reasonable probability that, but for
9 counsel's errors, the result of the proceeding would have
10 been different." Strickland v. Washington, 466 U.S. 668,
11 688, 694 (1984). The "likelihood of a different result
12 must be substantial, not just conceivable." Harrington
13 v. Richter, 562 U.S. 86, 112 (2011).
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15 Petitioner's motion references his first lawyer,
16 Assistant Federal Public Defender Kay Otani, whom
17 Petitioner contends was "very much asleep" during his
18 representation, which concluded shortly after the plea
19 agreement. (See Doc. No. 31.) (appointing new counsel
20 two weeks after the June 18, 2013 change of plea
21 hearing). The major defect Petitioner complains of was
22 Attorney Otani's failure to investigate adequately his
23 previous state court convictions. As noted, however,
24 Attorney Otani did not represent Petitioner through
25 sentencing and there is no allegation that Petitioner's
26 second appointed attorney fell below any standard of
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1 competence, or disagreed with the factual basis of the
2 plea agreement.

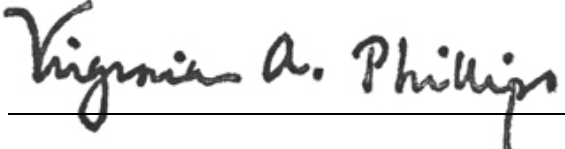
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4 Even if Petitioner's legal representation was
5 constitutionally defective, Petitioner cannot show he was
6 prejudiced by the defect for two reasons. First, the
7 Court did not accept the PSR's calculation of
8 Petitioner's criminal history score, and accordingly
9 decreased it to II before imposing sentence.⁶ Thus,
10 although the PSR's suggested guidelines range contained a
11 factual error (that Petitioner was on probation at the
12 time of the offense of conviction), the Court imposed
13 sentence based on a guidelines calculation that did not
14 reflect the error. Second, the Court's sentence departed
15 downward from the suggested guideline range. Thus,
16 Petitioner cannot show a substantial likelihood that he
17 was prejudiced by the performance of his counsel and
18 would have received a lower sentence had his counsel more
19 diligently investigated his criminal background, and any
20 claim of ineffective assistance of counsel has no merit.

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24 ⁶ At sentencing, the Court based its sentence on a
25 criminal history category of II, not III. (See Sent.
26 Hr'g Tr. at 13) (calculating guidelines range and noting:
27 "I am inclined to agree with the defense that that's an
28 overstatement of the seriousness of his past offenses
... I think he should be in criminal history category
2 based on that. So at criminal history category 2 and
offense level 22, the Guideline range is ... 46 to 57
months").

V. CONCLUSION

All of Petitioner's grounds for relief are procedurally defaulted, not cognizable under 28 U.S.C. § 2255, or meritless. Therefore the Court DENIES Petitioner's Motion WITH PREJUDICE. The record and files in this case show Petitioner is not entitled to relief; thus, no evidentiary hearing is required.

Dated: March 30, 2015


VIRGINIA A. PHILLIPS
United States District Judge